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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court
Of The Northern District Of Illinois

BRIEF OF APPELLEE

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In The

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Appellee.

On Appeal From A Three-Judge District Court
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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant neglected to include certain additional elements in the statement of the case. Within a few dates after the filing of this case a similar case was in the same district. *Donna Klaetsch and Peter Lombardo* v. *Grace Mary Stern, County Clerk,* Civil Action No. 71C2415. These cases were consolidated for argument and decision

since the issues were identical. For reasons beyond appellee's knowledge the *Klaetsch* case is not before this court. The defendant below apparently is not interested in pursuing the appeal.

An injunction issued by the court against enforcement of the statute in the March 21, 1972 primary. Mrs. Pontikes cast a ballot in the Democratic Primary.

SUMMARY OF THE ARGUMENT

The three judge panel correctly interpreted the case as a controversy ripe for decision. The parties were in an adversary relationship to one another. The statute in question if upheld would deny relief to the plaintiff; if the statute was ruled unconstitutional Mrs. Pontikes would be allowed to vote as she wished. Since it was not a criminal case, there was no way to ripen the case and Declaratory Judgment was the only relief available.

There was jurisdiction in the case since there was a substantial federal question: whether Ch. 46, Sec. 7-43d (Ill. Rev. Stats. 1971) was constitutional. The standard enunciated by Justice Cardozo was not in that the interpretation of the state law in light of the Constitution was determinative of the issues.

A three judge court was the only judicial body which could legally decide the case under 28 U.S.C. 2281 since a state law was alleged to be unconstitutional. The statute was statewide in effect, carried out by officers delegated with responsibility to execute it. Voting is clearly such a substantial question as to justify the use of a three judge panel. Election cases challenging state laws have almost exclusively been decided by three judge panels.

The doctrine of abstention is not applicable. This only should be decided without reaching the constitutional question. That is impossible here. The only Illinois case involving the statute's predecessor left the question open and the constitutional objections weren't raised. The Federal Courts have decided a score of cases involving state election law recently.

The Court should affirm the district court decision striking down the Illinois statute as unconstitutional. Although the two party system is a valued part of our democracy it has restraints placed upon it. The rights of parties must yield to the rights of voters. The allowable limits on candidates rights are distinguishable since candidacy is a privilege and voting as a right. The courts must recognize the right to change political allegiance or attitudes as it has the right to change residence.

ARGUMENT

I.

THE CASE WAS NOT A HYPOTHETICAL ONE WHEN BEFORE THE THREE JUDGE COURT, BUT WAS ONE RIPE FOR DECISION.

The appellants claim that the three judge panel went beyond the four corners of the pleadings to read into the pleadings sufficient basis to decide the issues. The appellants have neglected to note the complaint (App. 2) makes reference to a plea for Injunctive relief in its headings; additionally, there is a reference to Title 28, Sec. 1983, which was clearly meant to read Title 42. There is further reference to Title 28, Sec. 2281 and 2284 U.S.C. in the application for three judge panel (App. 6) and the brief in support thereof (App. 7). Surely appellants do not rely on a scrivener's error as grounds for reversal of a case which affects the voting rights of hundreds of thousands of Illinois residents.

The relief granted by the court was clearly consistent with the prayer for relief in the complaint, paragraphs 2 and 3 (App. 5).

The question of when a matter is hypothetical and when it is ripe for decision via declaratory judgment is one which has long troubled courts and commentators. The fine line which separates the hypothetical from the controverted must be examined. The courts have offered some guidance. Basically, the question in each case is whether the facts averred under the existing circumstances present a real controversy between parties having adverse legal

interests of such immediacy and reality to warrant a declaratory judgment. *Altwater* v. *Freeman*, 1943, 319 U.S. 359, 63 S.Ct. 1115, 87 L.Ed. 1450; *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 1941, 312 U.S. 27, 61 S.Ct. 510, 85 L.Ed. 826.

A case cited by appellants—*Aetna Life Insurance Co. of Hartford, Conn.* v. *Haworth*, 1937, 367 U.S. 497, 57 S.Ct. 461, 81 L.Ed. 617, involved an insurance policy, as declaratory judgment cases so often do, where although the court was given us when the court said that such a case must be ruled there was no case or controversy a useful standard "definite and concrete touching legal relations of parties and a dispute between parties who face each other."

Obviously, the facts of each case must be measured against this standard. Although the cases cited by appellant may not measure up, the instant case certainly does. There is clearly a controversy. The statute in question, Ch. 46, Sec. 7-43d (Ill. Rev. Stats. 1971) prohibited the plaintiffs (plural is used due to the companion case *Klaetsch* v. *Stern* heretofore mentioned in the statement of the case) from doing what they wished to do,—to-wit: vote in the Democratic party primary on March 21, 1972.

The adversity of interests of the parties is equally clear. It is the duty of the defendants to execute the statute in question. Ch. 46, Sec. 6-21 (Ill. Rev. Stats. 1971). The plaintiffs say in their et seq. complaints that they wish to be allowed to act contrary to the statute and pray the Court bar the defendants from carrying out their statutory duty. What could be more adverse?

The immediacy spoken of in the above cited cases is implicit in any election case.

Appellant's brief also cites *Poe* v. *Ullman*, 1961, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989 is authority for its position that no case or controversy exists. In that case plaintiffs sought to enjoin a Connecticut statute barring dissemination of birth control devices on the grounds that it was unconstitutional. The Supreme Court refused to entertain the plaintiffs' claim since there had been no showing that plaintiffs were in imminent danger of being affected by the statute through criminal prosecution. In a concurring opinion, Justice Brennan noted that there was time to decide the matter—if and when the plaintiffs were prosecuted under the statute.

In fact, the plaintiffs subsequently were prosecuted after committing the prohibited acts. The statute was eventually ruled unconstitutional in *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510. At this point the case was ripe.

Unfortunately, there was no way in which Harriet Pontikes could "ripen" her case. She could not do the prohibited act—vote—because the defendants could effectively prevent it by not giving her access to the voting machine. It was impossible. In the case of criminal statute one who wishes to challenge the law can do so by breaking it and awaiting prosecution. Thus, there is no need to decide the question until that point. It is conceivable that the applicable government authorities might never seek to enforce the statute.

The instant case provided less desirable options. Either the plaintiff could challenge the statute or forfeit her right to vote for the candidate of her choice in 1972. By 1974, she could have voted in any primary without violating the statute. It would then the February, 1975 pri-

mary before the question could then arise. If she had foreborn and not voted or voted in the Republican primary where there was only one "contest", and that of no significance, the question presented would be moot. Obviously, the Court could not adjudicate it at that point.

Additionally, the franchise is a unique and integral part of our democracy. There is no way in which the plaintiff could have been compensated for her loss. What would a court do after an election when presented with thousands of persons who had wished to vote for a candidate who had narrowly been defeated when the persons votes had been "lost" due to a statute later held to be unconstitutional. Reverse the election? Hardly. The most practical solution would be to adjudicate the rights at a time when there is a controversy and it can be resolved without great upset to the parties and others affected by the decision.

Appellants decry the lack of evidence especially with respect to the question of party raiding (which will be discussed at great length *infra*). Yet they produced no affidavits to substantiate their political theories which they seek to weave into facts.

The fact that plaintiff was part of a group being discriminated against is also implicit from two facts. One, a similar law suit was filed in the same district on behalf of other voters in another of the 103 election districts against their County Clerk. Secondly, it should be apparent that others voted in the February, 1971 Republican primary other than the plaintiff.

Cases questioning the constitutionality of an election statute have been consistently heard by the Courts prior to the election and treated as justiciable. *Williams* v. *Rhodes*, 1968, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed. 2d 24.

Rosario v. *Rockefeller*, ... U.S. ....., 93 ST 1245, ... L.Ed. 2d ..... (1973); *Bendinger* v. *Ogilvie*, 335 F. Supp. 572 (N.D. Ill. 1971); *Jackson* v. *Ogilvie*, 401 U.S. 904, 91 S.Ct. 642 (1971).

Clearly the case presented was ready for and in need of adjudication.

II.

THE THREE JUDGE DISTRICT COURT HAD JURISDICTION TO DECIDE THIS CASE.

The appellants next contend that a Federal Court has no jurisdiction to decide a case which seeks to hold state law to be in derogation to the United States Constitution and thus unconstitutionally invalid. The cases cited clearly are not in point.

In *McNutt* v. *General Motors Acceptance Corporation of Indiana, Inc.*, 298 U.S. 178, 56 S.Ct. 780 (1936), jurisdiction was ultimately denied because plaintiff could not show presence of the jurisdictional amount. This has no relevance to the instant case where the jurisdiction is based on the presence of a "Federal question".

The appellant's brief also relies upon *Pan American Petro Corp.* v. *Superior Court of Delaware*, 366 U.S. 656, 81 S.Ct. 1303 (1961). In that case the cause was dismissed for want of jurisdiction because the facts showed that the cause of action arose under state law. This hardly is the case herein, where the plaintiff prays non application of state law due to the Federal Constitution.

Nor can the cases which relate to anticipated defenses be used by the appellant to substantiate their position. In the case of *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1930) the Court found that the

facts set forth in the complaint did not raise a federal question and the plaintiff could not rely on the defense interposed by the defendants to establish the court's jurisdiction.

It was in the *Gully* case, supra, that Justice Cardozo restated the test for determining the existence of a Federal question:

> "The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if it receives another." *First National Bank* v. *Williams,* 252 U.S. 504, 512, 40 S.Ct. 372, 374; *King County* v. *Seattle School District,* 263 U.S. 361, 363, 364, 44 S.Ct. 127, 128.

The instant case meets this test favorably. If the constitutionally guaranteed right to vote can be inhibited by the state law and can be limited to the party primary which the person last voted in, then plaintiff goes without day. If, as appellee and the District Court contend, the Constitution bars such a limitation, the statute is unconstitutional. Either the state is permitted to so limit the admitted right of the plaintiff or it is not. Only the United States Constitution could "overrule" a state statute since the Illinois Constitution is no way involved. No other law could be supreme in juxtaposition to the Illinois statute.

The appellants assert that the complaint fails to state a cause of action since it does not reflect a right upon which to sustain a claim. The brief submitted questions the conclusionary assertion of the violation of a right as being sufficient under Rule 8(a) F.R.Civ.P. At some point in every complaint, there must be the conclusion necessary to focus the facts alleged into a violated right. This is what has been done in paragraph 8 of the complaint. With-

out this, the defendant would not be apprised of the basis upon which the plaintiff's cause of action rests.

The recitation of case after case where the 14th Amendment was used to strike down laws which caused racial or ethnic discrimination is bewildering. None of the cases cited state that laws will only be considered violative of the 14th Amendment if there is racial discrimination. The same is true of the cases cited detailing the granting of relief from discrimination against the poor. Nowhere in the Constitution or the cases listed is it stated that the protection of the 14th Amendment is exclusively vested in the poor or the racial minorities. One need not show racial or economic discrimination to invoke the 14th Amendment to protect one's rights.

In fact, the language in *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1943, 1496 (1969) indicates to the contrary.

> "*All* procedures used by a state as an integral part of the election process must pass muster against charges of discrimination." (italics added)

The question of group discrimination is misunderstood by the appellant. Plaintiff was clearly not an isolated person among millions of Illinois residents who rights were affected. To believe this is an absurd view of reality. The case of *Williams* v. *Rhodes*, supra, discussed at length the question of free association.

In *Williams*, the plaintiffs sought to place candidates of a "3rd" political party on the ballot. Ohio law placed severe restrictions so doing by requiring huge numbers of signatures to be affixed to petitions of said new party. This was challenged as denial of the Equal Protection of the laws as prohibited by the 14th Amendment. The Court found the Constitution protects the same right which is

asserted herein—the right to case an effective vote. At 393 U.S. 29, 30, the court said

> "in the present situation the state laws place burdens on two different, although overlapping, kinds of rights —the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States."

Similarly, in the cases of *Rosario* v. *Rockefeller* supra, *Gordon* v. *Executive Committee, of the Democratic Party of the City of Charleston* (DC SC 1971) 335 F. Supp. 166, the rights asserted herein where recognized.

Appellants next claim that the state can regulate election laws under Article I, Sec. 2 of the U.S. Constitution. *Oregon* v. *Mitchell,* 400 U.S. 112, 91 S.Ct. 260 (1970) is cited in support thereof, although that case discussed the matter of the state's prerogative with respect to age qualification for voters. This right to regulate elections is clearly limited under Amendments I and 14 of the U.S. Constitution. *Williams* v. *Rhodes* supra; *Smith* v. *Allwright,* 321 U.S. 649, 64 S.Ct. 757 (1944); *United States* v. *Classic,* 313 U.S. 299, 318 61 S.Ct 1031, 85 L.Ed 1368 (1941).

The association through actual physical gathering together of the plaintiff with others is not a condition precedent to her assertion of her right to vote. However, the coincidental filing of the *Klaetsch* case belies the de-

fense interposed. Further, the attention is again called to the language in Williams previously cited with respect to the co-existence of the similarly constituted right to cast an "effective vote."

Plaintiff clearly has a problem common with many other of the 439,712 voters who voted in the February 1971 primary. The fact that the defendants recognized this right when subsequent to the ruling by the District Court they issued an order granting uniform application of the decision (Ex. 1). The defendants recognized the group as well as the Court did.

The spurious nature of the defendant—appellant's contention is seen by the almost incidental treatment given it by the District Court in two sentences (App. 42). Even the dissent does not agree with the position of the appellant (App. 50).

There is jurisdiction to decide the case.

III.

THE MATTER WAS PROPERLY DECIDED BY A THREE JUDGE DISTRICT COURT.

The appellant further challenges the formation of a three judge panel to decide the case although this same argument was refused and rejected by the very trial judge who dissented at the District Court level in the determinative portion of the case. (App. 11-15, App. 50)

The jurisdiction of a three judge panel is sought under 28 U.S.C. 2281 which provides:

> "Injunction Against Enforcement Of State Statute—Three-Judge Court Required—An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by re-

> straining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

There is no option in the parties—there must be a three judge panel convened. The test which appellants try to apply boil down to a single principle—is it a state statute with statewide application by an officer delegated to so act by statute in a substantial case.

Moody v. *Flowers,* 387 U.S. 97, 87 S.Ct. 1544 (1967) was a case in which a county reapportionment act was attacked. Since it involved two cases each of which involved a county body making a decision for the county residents, it was held that a three judge panel was improper. There was no statewide effect.

Such is not the case here. The section of the statute attacked is applicable to all of the residents of Illinois—not just one county. The defendants are delegated the duty of enforcing the law. In Illinois there are 102 counties. Each of the 101 "downstate" counties (everything in Illinois outside Cook County is euphemistically called downstate even if it is North of Cook County) has jurisdiction over its elections and this power is reposed in the County Clerks (Ch. 46, Sec. 4-1 et seq. Ill. Rev. Stats. 1971.) In Cook County, the City of Chicago and certain few suburbs or "country towns" are under the jurisdiction of the defendants herein. The remaining towns of Cook County are under the jurisdiction of the Cook County

Clerk and Cook County Board (CH. 43, Sec. 5-1 et seq. Ill. Rev. Stats.). Thus, the state has delegated the responsibilities of administering the law in question to various convenient subdivisions. But it is the same law which is being administered by various local officials in the same as County State's Attorneys prosecute violations as the Criminal Code.

The only remaining standard to be met is that of a substantial federal question. One of the cases cited by appellant's brief, *Swift & Company* v. *Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 263 (1965) was indeed one where the Court ruled a three judge panel inappropriate and unnecessary. This case involved an alleged conflict between state and Federal labelling laws for frozen turkeys. The court found that there was present a question of the Supremacy clause, not a constitutional issue, and said "Sec. 2281 was designed to provide a more responsible forum for litigation of suits which, if successful, would render void state statute embodying *important* (italics added) state policies."

Peter Finley Dunne's philosophical bartender of another era once observed "politics ain't beanbag." Perhaps one could analogize that "voting isn't turkeys." There, can be no more important statutes than those with respect to the franchise.

This is why courts across the land have practically, without exception, decided cases involving state electoral laws by a three judge court. *Williams* v. *Rhodes, supra, Bendinger* v. *Ogilvie,* supra, *Gordon* v. *Executive Committee, supra; Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691 7 L.Ed. 2d 663 (1962) *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 506 (1964); *NAACP* v. *But-*

ton, 371 U.S. 415 1963); *Jackson* v. *Ogilvie*, supra; *Howard* v. *Ladner*, 116 F. Supp D.C. Miss 1953); *Stokes* v. *Fortsor*, 234 F.Supp. 575 (D.C. Ga. 1964) *Vottagio* v. *Caputo*, 210 F.Supp. 337 (D.C. NJ 1962).

There was no proper legal alternative to the three judge court. The system was devised so that an important state law could not be overturned by a single District judge. It was cases such as this that Congress must have in mind when Sec. 2281 - Sec. 2284 were enacted.

In the very district in which the case was brought, the three judge panel had been invoked in *Jackson* supra and *Bendinger*, supra as well as *Romiti* v. *Kerner*, 256 F.Supp. 35 (D.C. Ill. 1966) where the plaintiffs questioned the constitutionality of Illinois statutes relating to the election of Circuit Court judges. This was deemed important enough to require a three judge panel.

Appellants again resort to their claim that plaintiff herein was an isolated voice in the wilderness, whose rights were unique and different from all other Illinois residents. This frivolous claim has been refuted elsewhere herein. To accept the position of the appellant would be to frustrate the goal of Congress and allow one federal judge to invalidate a state statute. This was not the desire of the Congress.

IV.

THE DISTRICT COURT PROPERLY RULED ON THE MATTER RATHER THAN ABSTAINING.

The appellants now contend that there should be no ruling on this matter under the doctrine of abstention even though this defense was not interposed at the trial level in the answer filed by the defendant, nor in the amended

answer (App. 23) nor in the answer to motion for Summary Judgment and Suggestions (App. 29). It is somewhat late to raise this point, but assuming *arguendo* that the Board can raise this defense at this late juncture the arguments raised are without merit.

First it is suggested that a Federal Court cannot interpret a state statute until the state courts do. Then why did Congress enact 28 U.S.C. 2281?

The doctrine of abstention is misunderstood by appellants, but is succinctly stated as follows:

> "Thus abstention is variously recognized: (1) to avoid decision of a federal of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket." *Wright, Law of Federal Courts 1970* p. 196.

Railroad Commission of Texas v. *Pullman,* 312 US 496, 61 S.Ct. 643 (1941) is the leading case discussing points 1, 3 and 4 which are difficult to separate in cases such as this. In that case the Pullman Co. sought to enjoin enforcement of a *regulation* of the Commission claiming two reasons: violation of its 14th Amendment rights and promulgation of orders beyond its authority. The Court refused to entertain the case since there was a substantial chance that dispositive ruling could be made without the necessity of reaching the Constitutional question. If the state court ruled that the Commission exceeded their authority, then the Constitutional question would never be reached.

Such is not the case here. Given the validity of the statute, it would affect the Plaintiff. The only grounds to hold it invalidate it would be as violative of the state or Federal constitution. There is no allegation that the law offends the Illinois Constitution. The only grounds sought to invalidate the statute is its antipathy to the U.S. Constitution. If the Court were to abstain they would be saying that no Federal Court should decide the issue, that 28 U.S.C. 2281 was to be ignored and the case was to go to the state court to determine the Federal question. Such is not the concept of our Judicial system.

The case of *Faherty* v. *The Board of Election Commissioners of the City of Chicago,* 5 Ill. 2d 519, 126 NE 2d 235 (1955) at first blush looks like a similar challenge to a similar law. Plaintiff voted in the April 1954 Republican Primary and wished to vote in the Democratic Primary in Chicago in February 1955 (where the present Mayor Richard J. Daley was nominated over the incumbent) and then go back to the Republican Primary in April 1956. The complaint challenged not the statute, but the defendant's interpretation which would deny their wishes. He sought a judgment declaring the statute inapplicable in cases of municipal primaries. *No Constitutional arguments were raised whatsoever.* The Court stated only at 265 NE 2d 235, 238

> "the section is intended to prevent those who voted in the primary of one political party at a state wide primary election from voting in the primary of the other political party at a municipal primary election which occurs within 23 months."

That statement is not only conceded, but is the reason the suit was brought. What the 3 judge District Court has decided and what this Court must decide is whether the

interpretation of the statute placed upon it by the Illinois Supreme Court is Constitutionally permissible. No other channel for deciding this issue is available due to 28 U.S.C. 2281. This Court must face this question. No one has said it better than Chief Justice John Marshall over 150 years ago when he said:

> It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution.
>
> . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution" *Cohens* v. *Virginia,* 6 Wheat 264, 404, 5 LE 257 (1921).

The citation of *Jackson* v. *Ogilvie,* supra as authority for abstaining is equally invalid since that case was not decided because the issues were moot. The recitation of seemingly useful dicta should not be construed as binding precedent. That case involved merely signature requirements to be placed on the ballot and didn't come before this Court until after the election.

The new wave of voting cases of the past decade challenging various state registration, primary and reapportionment laws have consistently been decided by Federal Courts. *Williams* v. *Rhodes* supra, *Rosario* v. *Rockefeller,* supra; *Gordon* v. *Executive Committee,* supra; *Bendinger* v. *Ogilvie; Lippitt* v. *Cippollone,* 357 F. Supp. 1405 (ND Ohio 1971) affd 404 US 1032, 92 S.Ct. 729 (1972).

Further the Court not only should not abstain but may not in this case since there is "no underlying issue of state law controlling [the] litigation. *McNeese* v. *Board of Education for Community Unity School District 187*, 373 U.S. 668, 674 (1963).

V.

THE STATUTE IN QUESTION WAS PROPERLY DECLARED UNCONSTITUTIONAL AS VIOLATIVE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Appellants are correct when they say that the Illinois Supreme Court in *Faherty*, supra, left open the question of the validity. However, for the reasons heretofore cited, they should not only not dissuade this Court from deciding the issue, but encourage it to do so in order that the citizens of Illinois (and other states whose citizens might be affected) must know what their rights are. Additionally, this is the first time that the constitutionality of the act has been raised.

Much has been said by the Commissioners of their regard for the party system and the need to preserve its integrity. The history of political parties in this country is well known. Our first President, George Washington, was elected without political parties or even any opposition. The party system soon evolved along the question of a strong central government. The adherents to the positive point of view—Alexander Hamilton and John Adams—became the architects of the Federalist party while Thomas Jefferson and his followers who favored less power in the national government with more left to the states and the people became the Democratic—Republicans and ultimately the Democrats.

As the Federalist party faded in the 1820's, the Whig party became the alternative to the Democrats of Andrew Jackson. During this period, there were splinter parties, but as slavery became more and more the issue in the country, the Republican Party appeared on the scene. In 1856, they mounted their Presidential campaign. Although John C. Fremont was defeated, the new party soon became the dominant one. The Republicans won the next six elections and in 68 years, lost only 4 of 18 Presidential elections.

In the 20th century, the Democratic and Republican parties became *the* parties and the two party system became entrenched. Yet in 1920, 1924 and 1948, other candidates for President received over a million votes. The 1968 election saw George Wallace, as the candidate of the American Independent Party gain over 9 million votes.

The parties and their procedures have become party of our daily lives. Pollsters divide the populous into Democrats, Republicans and Independents, noting a steady increase in the third category. All of the 535 members of Congress are either Democrats or Republicans; all of the 50 governors represent one of the two political parties. The parties' National Convention and primaries attract nationwide attention. It has been said that political parties are an integral part of our system. Although it was not written into the Constitution, it is probably true.

When the rights of one group or person conflict with another, we have a problem, often one left for the courts to decide. This is true here. The Court must balance the right of the political parties as protected by the state against the interests of the voters.

The right to vote is a sacred one. The appellee makes no attempt to attach preferential treatment for one right as against another as the appellant's brief implies. However, it is worthwhile to reflect on the preciousness of the franchise as our forefathers saw it in the Federalist papers, written to encourage ratification of the Constitution, to-wit:

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution." *Federalist 52, Brittanica Great Books* Vol. 43, P. 165.

The Courts have protected the right to vote against infringement because of color. *Smith* v. *Allwright*, supra; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960); *Hadnott* v. *Amos*, 394 U.S. 358, 89 S.Ct. 1101 (1969); or due to poverty *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966) *Harper* v. *Vance* 342 F. Supp. 136 (1972 DC Ala) or due to loss of effective vote due to malapportionment, *Reynolds* v. *Sims*, supra; *Baker* v. *Carr*, supra, *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481.

The brief of the Board cites law where the interests of political parties are given consideration. Recently, the courts have limited that power. In Pennsylvania, the equal protection clause was invoked to prevent the political parties from allowing their members who were government employees, the day off with pay on Primary Election Day. It was reasoned that to do this so they can aid candidates endorsed by the local political party "discriminated against all other political candidates and deprived them of the equal protection of the law." *White* v. *Snear*, 313 F. Supp. 1100 (1970 DC Pa).

Further, restraints on the zeal of political parties when such activity impinges on the rights of voters and candidates have been ordered by Seventh Circuit Court of Appeals and the District Court for the Northern District of Illinois where the instant case arose. In *Shakman* v. *Democratic Organization of Cook County,* 435 F.2d 267 revg 310 F.Supp 1398 and on remand 356 F.Supp 1241 (DC Ill 1973) the court held that rights of voters, candidates and taxpayers with respect to patronage practices are not merely deviations of the rights of the patronage employees. The court further ruled that forcing persons to do political and campaign work and to vote for party candidates states a cause of action with respect to constitutional rights of voters, candidates and taxpayers since this practice serves to perpetuate the dominant political party to the disadvantage of the other(s) and independents.

Further systems which tend to perpetuate one party or an incumbent against "newcomers" was likewise held an invalid exercise of power. The court ordered the Illinois Secretary of State, whose policy favored certain persons with past legislative experience, incumbents and cronies with ballot position to use a system fair to all. *Mann* v. *Powell,* 333 F.Supp 1261 (DC Ill 1971).

The states have less leeway in making classifications when "fundamental rights and liberties than in economic matters. *Harper* v. *Virginia State Board* supra. The balancing of these interests is not really difficult, because "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg* v. *State Bar,* 366 U.S. 36, 61, 81 S.Ct. 997, 1012.

The question of compelling state interest is a difficult one. In *Williams* v. *Rhodes,* supra, the court had to decide

whether Ohio law which made it virtually impossible to place candidates of a minority party on the ballot violated the equal protection clause of the 14th Amendment. The state argued that their interest in preserving the two party system and party integrity outweighed the freedom to vote and associate through the electoral process of the plaintiffs.

The court held that such a statute so placed an unequal burden on the minority groups to overcome the state interest.

The case of *Rosario* v. *Rockefeller,* supra, is seemingly similar to the instant case, but distinguishable at a crucial point. The New York statute in question there, required voters to register 30 days prior to a general election to be eligible to vote in the next primary. This forces a declaration of party affiliation; it can lock a voter out of a particular primary. But in New York, as the court took great pains to point out the voter *can* vote by simply enrolling his name. Plaintiff *Rosario,* did not choose to do so. There are even extensions for those who became qualified after the original enrollment date, those who were too ill to enroll or those who moved within the single county.

The potential voters in the New York case cited many cases where the franchise was lost due to the operation of state law, which was subsequently invalidated as contrary to the U.S. Constitution. At 93 S.Ct 1249, the majority distinguished those cases since "in each of those uses, the state totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of the class could have made themselves eligible to vote."

That is the result of the statute complained of.

But wait say the Commissioners: She could have voted in the Republican primary.

What is the right to vote and if the voter cannot vote for the candidate of her choice? In *Williams*, the court recognized this in placing the Independent Party on the ballote by saying at 393 U.S. 23, 31:

> "So also the right to vote is heavily burdened if that vote may be cast only for one of the two parties at a time when others are clamoring for a place on the ballot."

A restricted vote is a lost vote. The Constitution can only preserve the integrity of the franchise by insuring the voter the widest possible choice among those who offer themselves for office.

The case of *Bendinger* v. *Ogilvie*, supra, was brought in the District Court of Illinois to declare another section of the Ill. Election Code invalid, Ch. 46, Sec. 8-8 (Ill. Rev. Stats. 1971) provides as a requirement for eligibility for a candidate for public office among other items that a person cannot have "requested a primary ballot of any other party at a primary election held within two years of the date on which the petition (for nomination) must be filed." The court upheld the provision saying the compelling state interest of preventing a "multitude of party swapping candidates" outweighed the right to run for office. The Court distinguished *Gordon* v. *Executive Committee*, supra, and said at page 586:

> "However, *Gordon* dealt with the restriction upon party switching placed on voters in primary elections. The instant case involves the restrictions placed upon candidates in primary elections. The state's interest in

limiting candidates from switching parties, as detailed above, is greater than its interest in preserving a vigorous and competitive two-party system and is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; *the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so.*" (italics added)

This is the true picture of what local Federal judges think the state of the Illinois Election Code is. The judicial dicta therein is ample authority for affirmance of the District Court decision herein.

The case of *Lippitt* v. *Cippolone*, supra, is almost identical with the *Bendinger* case. Lippitt had been a Republican who wished to run as a member of the American Independent Party in the face of a similar Ohio statute. The Court upheld the statute placing party integrity above the right to hold office.

The courts have always held that the right to seek or hold publice office is a privilege, not a right. *Snowden* v. *Hughes*, 312 U.S. 1, 64 S.Ct. 397, 88 L.Ed 497 affg (CCA7) 132 F.2d 476. *Peo. ex rel Graham* v. *Lindsey*, 80 Colo. 465, 253 Pac. 465; *Jeffries* v. *Election Commission*, 294 Mich. 255, 293 NW 546.

There is no question that the franchise is a right not a privilege. It will be protected against incursion even in primaries. *Brown* v. *Baskin*, 78 F.Supp 9333 (1948 D.C.).

There is much political theory in the Commissioner's brief. I will not indulge in supposition as to whether or not the District Court decision affected the 1972 Illinois primary results. That is not relevant. Citizens' rights are relevant. Nonetheless, it is incumbent upon the plaintiff to set the record straight.

Figures given by the appellant's office indicate that in 1971, 397, 818 persons voted in the Democratic primary and 41,994 in the Republican. 13 months later, with the franchise extended to 18 years and the District Court decision in force, 760,157 persons cast Democratic ballots against 88,921 persons asked for Republican ballots.

In 1971, approximately 9.5% of the voters asked for Republican ballots, whereas 90.5% voted in the Democratic primary. In 1972, nearly twice as many persons voted with approximately 10.5% of the persons voting in the Republican primary and the balance in the Democratic primary where there were hotly contested races for Governor and Cook County States Attorney. Where is the raiding? The published figures of the defendant belie their thesis.

The defense contention that Republicans contrived to elect a weaker Democratic candidate for Governor seems rather silly when the candidate carried the area of the Commissioners aegis 806,603 to 542,245 in November. It is of some historical importance to note that this "weaker" candidate is now Governor, Daniel Walker.

The contention that the Classic case merely secured the right to vote in a primary and have the government insure its accurate tabulation and nothing more is myopic. What good is the right to vote in a primary (or any election) if you cannot vote for, or against, the candidate of your choice?

The logical extension of the argument of the Commissioners that we presume that statutes are valid is to obviate 28 U.S.C. 2281.

In the case of *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404 (1969) the Court upheld the validity of the Statute which prevented jail inmates from obtaining absentee ballots. This was done not because the Court didn't wish to declare the statute unconstitutional but it was constitutional in that it only prevented absentee voting and did not bar the right to vote.

The claim that appellants received no opportunity to present facts to substantiate the "compelling interests" of the State is also fallacious. The Commissioners opportunity to file affidavits or anything else along with their answer to Motion for Summary Judgment and suggestions [App. 29].

The provision of Article I, Section 2 of the Constitution with respect to voting rights was also discussed in a case which appellant consistently tries to ignore. In *Williams* v. *Rhodes,* supra, this section was interposed by the state to try to justify and denial of the right to vote and associate to the plaintiffs—the 89 S.Ct. 10, the court said.

> "Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No state shall • • • deny to any person • • • the equal protection of the laws."

The question of when a person, if ever, becomes a member of a political party in Illinois is a troublesome one. Under

Illinois law the primary in which a person votes is recorded, but no list is kept by party of its members. On the National level, the Republican party has no enrollment or membership cards and only recently has the Democratic party sought to encourage membership into the payment of a fee a receipt of certain data. If this however would not foreclose an individual from voting in a Republican primary in his home state.

One of the facts of which the court must take cognizance is the fluidity of politcal change. In the past few years we have seen such prominent political figures as Senator Strom Thurmond, former Senator Wayne Morse, Governor George Wallace, Mayor John Lindsey and most recently former Governor John Connally announce publicly their changes in party allegiance. Party lines are further blurred by the endorsement of Democrats by Republicans and vice-versa. No Presidential, Gubernatorial or Senatorial campaign would be complete without a list of supporters from the opposite party.

Voter allegiance to a political party is likewise dwindling. In 1972 for the first time the voters of Illinois voted for the Presidential candidate of one party and the Gubernatorial candidate of the other, while President Nixon, Senator Charles Percy and Attorney General William Scott were piling up huge Republican majorities, the incumbent Republican governor and the Republican acting Secretary of State were defeated by their Democratic opponents.

The Court has recognized sociological changes in America with respect to election law. In 1904 the Supreme Court upheld a registration and residency requirement within a state as a valid form of qualifying as an elector. The court said:

"The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."

Pope v. *Williams,* 193 U.S. 621, 24 S. Ct. 573, 48 L. Ed. 817 (1904).

Recently, however, courts have begun to recognize the mobility of our society and have struck down residency requirements as they discriminate against college students, *Newberger* v. *Peterson;* (1972 DC NH) 344 F. Supp 559; their residency requirements in *Tennessee, Dunn* v. *Blumstein,* 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed. 2d 294 (1972); in *Massachusetts Burg* v. *Camille,* 315 F. Supp. 38 d (DC Mass) affd 405 U.S. 1034, 92 S. Ct. 1303, 31 L Ed 2d 575 (1972); In Alabama, *Hadnott* v. *Amos,* supra; in Connecticut, *Kohn* v. *Davis,* 320 F. Supp (DC Conn) affd 405 U.S. 1034, 92 S. Ct. 1305, 31 L Ed 2d 576 (1972); Minnesota, *Keppel* v. *Donovan,* 326 F. Supp 15 (DC Minn) affd 405 U.S. 1034, 92 S. Ct. 1304, 31 L Ed 2d 576 (1972); and in North Carolina, *Andrew* v. *Cody,* 327 F. Supp. 793 (DC NC) affd 405 U.S. 1034, 92 S. Ct. 1306, 31 L. Ed 2d 576 (1972) and in Mississippi *Ferguson* v. *Williams,* 1972 (DC Miss) 343 F. Supp. 654.

Likewise the court must recognize that people change their feelings about candidates and parties. In 1960 Richard Nixon was defeated for a president while in 1972 he was elected with the assent of the voters in 49 of the 50 states. In 1964 the Republican Party got less than 40% of the national vote but 8 years later it received approximately 60% of the vote.

No primary law requires a person to vote in the final election for a candidate whom he voted for in a primary. To do so would be outlandish. To lock a person into the primary of one party and prevent him from casting an effective vote is equally outlandish. That is why courts across the country have struck down similar state statutes in New Jersey, *Nagler* v. *Stiles* (1972 DC N.J.) 343 F Supp 415; in Rhode Island, *Yale* v. *Curvin,* (1972) DC R.I.) 345 F. Supp. 447 and in South Carolina, *Gordon* v. *Executive Committee,* supra. That is why this court must affirm the striking down of Chapter 46, Sec. 7-43d of the Illinois Revised Statutes (1971) as an unconstitutional denial of equal protection of the laws.

CONCLUSION

The Court must affirm the district court decision and hold Ch. 46, Sec. 7-43d unconstitutional. To do otherwise would ignore the collective wisdom of district courts in different areas of the country and would ignore the 14th Amendment of the Constitution and greatly limit the franchise.

Respectfully submitted,

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